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No. 90-1774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEWIS STEPHEN WORK, ET AL.,

Petitioners,

vs.

TYSON FOODS, INC., ET AL.

Respondents.

Petition for Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURTS CORRECTLY GAVE RES JUDICATA EFFECT TO THE CONSENT DECREE ENTERED IN THE COMPANION EPA ACTION.

II.

WHETHER THIS COURT MUST REVIEW THE PENALTY ASSESSED AGAINST RESPONDENT.

III.

WHETHER THE EIGHTH CIRCUIT'S ORDER REGARDING COSTS AND FEES PRESENTS A QUESTION WORTHY OF THIS COURT'S REVIEW.

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OPINIONS BELOW

The opinion of the Eighth Circuit is reported as *EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990), and the opinion of the trial court is reported as *Work v. Tyson Foods, Inc.*, 720 F. Supp. 132 (W.D.Ark. 1989), *rev'd in part sub nom. EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990). Both, along with certain unreported orders, also appear in the appendix to the petition.

JURISDICTION

This Court's jurisdiction is properly invoked pursuant to 28 U.S.C. § 1254(1). The petition appears to respondent to have been timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES

This brief contains citations to the seventh amendment, U.S. Const. amend. VII, and to two sections of the Clean Water Act, 33 U.S.C. § 1319 and 33 U.S.C. § 1365, all of which are set out in the appendix to the petition.

STATEMENT OF THE CASE

Although petitioners' statement of the case contains more information than necessary, respondent generally agrees with petitioners' description of the proceedings below. In two particulars, however, that statement of the case is misleading.

First, petitioners state on page 9 that "in May 1989, the POTW was again upset and Dry Creek was polluted." The record, however, includes no evidence that the city exceeded the parameters in its NPDES permit — for any potential pollutant — at any time after respondent's new treatment plant began operations in 1985.

Second, petitioners indicate that the Eighth Circuit's reversal of the trial court's denial of a recovery for property damage runs against both respondent and the city. Petition at 10. In reality, except for the claim of one petitioner, the Eighth Circuit reversed on this point only in connection with the inverse condemnation damages petitioners sought from the city. *EPA v. City of Green Forest*, 921 F.2d 1394, 1410, 1412 (8th Cir. 1990).

SUMMARY OF ARGUMENT

The Eighth Circuit correctly gave res judicata effect to the consent judgment entered in the companion EPA action, since the cases involve the same questions and petitioners are in privity with the EPA. There is no conflict among the circuits on this issue.

Nothing in the seventh amendment suggests that it was improper for the trial judge to set the penalty after the jury found liability. Further, since petitioners failed to make a seventh amendment argument below, they should not be permitted to raise it here.

The Eighth Circuit was within its discretion in ordering each party to bear its own fees on appeal. The Clean Water Act requires an award of fees only when appropriate and not as a matter of routine. As petitioners failed in part to comply with the Federal Rules of Appellate Procedure, the denial of fees was reasonable.

ARGUMENT

I. THE LOWER COURTS CORRECTLY GAVE RES JUDICATA EFFECT TO THE CONSENT DECREE ENTERED IN THE COMPANION EPA ACTION

Virtually all the authorities upon which petitioners[1] rely address the propriety of dismissing a citizen suit upon the later filing of a governmental enforcement action. The controlling question in each such case was whether the government filed its separate action during the statutory notice period. Those concerns are not implicated here because this case involves the preclusive effect of a final judgment.

Res judicata takes no account of whether the first of two companion actions to reach judgment was the first filed. *See, e.g., Insurance Co. v. Harris*, 97 U.S. 331, 336 (1878). The relevant inquiry is instead whether the matters at issue were the same in both cases and then whether the first judgment was rendered by a court having jurisdiction. If so, "irrespective of which action or proceeding was first brought, it is the first final judgment rendered . . . which becomes conclusive." *Chicago, R.I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 616-17 (1926) (citations omitted). Further, a consent judgment which determines the facts and the law is treated like any other judgment for res judicata purposes. *United States v. International Bldg. Co.*, 345 U.S. 502, 506 (1953). Thus, the decree entered in the EPA action necessarily concluded the matters at issue here. Both cases involved the city's inability to comply with its NPDES permit; the EPA consent decree was therefore binding on the district court.

Even if this action and the EPA case are not otherwise sufficiently similar to trigger the application of res judicata (which respondent does not concede), petitioners stand here

[1] Petitioners are individuals; respondent is a corporation having only wholly owned subsidiaries.

in the shoes of the EPA. 33 U.S.C. § 1365(b)(1). They are therefore bound by the decision rendered in its action, for the rights of those in privity with a party to another action will be affected by any decision rendered there. *Cf. Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934) (rights of one not a party or privy unaffected by prior judgment).

Petitioners' contention that the consent decree should not have been held to bind them because they were "nonconsenting parties" is likewise of no merit. They may not rely on such cases as *Martin v. Wilks*, 490 U.S. 755 (1989), for the simple reason that the EPA, in settling its own action, acted on behalf of all aggrieved citizens, petitioners included.

Finally, there is no conflict among the circuits on this issue. All but one of the cases petitioners cite on this point, *Chesapeake Bay Found. v. American Recovery Co., Inc.*, 769 F.2d 207 (4th Cir. 1985), was decided by a district court, and *American Recovery* is not in any sense in conflict with the Eighth Circuit's decision here.[2] Until the other circuits actually rule on these issues, no conflict among them can exist and a grant of certiorari would be premature.

II. THIS COURT NEED NOT REVIEW THE PENALTY ASSESSED AGAINST RESPONDENT

Petitioners apparently believe that the seventh amendment requires the jury, not the judge, to set the penalties in a CWA action. This Court made clear in *Tull v. United States*, 481 U.S. 412 (1987), however, that Congress's delegation of the penalty calculation to the trial judge does not contravene the seventh amendment. The ultimate determination of both the severity of the violation for which liability might be

[2] Contrary to petitioners' suggestion, the *American Recovery* court did not approve the settlement simply because the plaintiffs endorsed it. Instead, it independently assessed the facts and concluded that the defendant had taken the actions necessary to abate the offending activity. *See id.* at 209.

imposed and the appropriate amount of the penalty is committed to the sound discretion of the trial court, not to the jury. *Tull*, 481 U.S. at 426-27.

Petitioners were entitled to a jury trial in the liability phase of this action, but "the trial court and not the jury should determine the amount of penalty, if any." *Id.* at 427. The Act commanded the trial judge to exercise independent judgment before imposing any penalty; he was therefore required to act on his discretion in setting the penalty. *Id.* at 425; *see also* 33 U.S.C. § 1319(d) (judge to consider, among other factors, those "justice may require").

Even assuming that this exercise of discretion required the trial court to construe the jury verdict, that is no violation of the seventh amendment. As this Court recognized in *Tull*, the early English practice, to which the seventh amendment traces its roots, would have sanctioned imposition of a penalty set by the legislature (or by its delegate, the trial judge), and not by the jury. *Id.* at 426.

Petitioners also complain that the penalty assessed against respondent amounts to only a small percentage of the maximum permissible and infer that the trial court must therefore have failed to consider the relevant factors. The district court's opinion indicates, however, that it took note of the factors enumerated in the CWA.[3] *See Work v. Tyson Foods, Inc.*, 720 F.Supp. 132, 138-39 (W.D.Ark. 1989), *rev'd in part sub nom. EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990).

Since the Act required the trial judge to consider such other factors as he thought relevant to a just result, his penalty

[3] Despite their references to the EPA Penalty Policy, even petitioners, by their citation of *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), acknowledge that "the court's primary focus should be on the statutory language of § 1319(d)." *id.* at 1142.

award of $43,000 may well have been influenced by the evidence that respondent paid the city some $642,000 in treatment surcharges before upgrading its pretreatment plant, that upgrading the plant cost it an additional $1.3 million, and that, at the city's request, respondent created a substantial number of new jobs at its Green Forest operation in order to help the city qualify for an Arkansas Industrial Development Commission grant to construct a new water system. In short, whatever amount petitioners assert respondent saved, the evidence showed that it also expended substantial sums.

Finally, since petitioners failed to make a seventh amendment argument below, this Court should not grant the writ to consider the seventh amendment claims they raise here.

III. THE EIGHTH CIRCUIT'S ORDER REGARDING COSTS AND FEES DOES NOT PRESENT A QUESTION WORTHY OF REVIEW

Petitioners advanced five points for reversal on CWA grounds below. The Eighth Circuit, however, affirmed the CWA portion of the district court's judgment, remanding only to allow petitioners to seek attorney's fees from Green Forest, and denying petitioners' application for fees on appeal. Far from being arbitrary, this was a reasonable and appropriate exercise of discretion. The remand demonstrates that the appellate court was sensitive to the concerns underlying the fee-shifting statute.

The CWA provides only that the court "may" award reasonable attorney fees, whenever it determines such an award is "appropriate." 33 U.S.C. § 1365(d). Here, the Eighth Circuit alone is aware of the extent to which the efforts of each party contributed to efficient resolution of the issues on

appeal.[4] Petitioners have suggested no convincing reason for this Court to examine its denial of fees.

The CWA, unlike the Civil Rights Attorney's Fees Awards Act, does not require that a prevailing party recover attorney's fees unless special circumstances dictate otherwise.[5] *Natural Resources Defense Council, Inc. v. Thomas*, 801 F.2d 457 (D.C. Cir. 1986). The civil rights fee shifting provision, which requires an award of fees, "is not textually similar to § 505(d) [§ 1365(d)], since it does not provide for awards where 'appropriate,' but states that the court 'may allow the prevailing party . . . a reasonable attorney's fee.'" *Id.* at 461 n.3 (Scalia, J.). In any event, petitioners achieved their limited success on the CWA claims in the trial court, where they already have the opportunity to seek fees.

Finally, the Eighth Circuit's order directing each party to bear its own fees is unlikely to influence later litigation under the Act; it is unreported.

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[4] Such concerns may underlie the denial of fees. At oral argument, for example, a member of the panel chided petitioners for submitting a virtually useless appendix. Rule 30(d) of the Federal Rules of Appellate Procedure required petitioners to present the relevant portions of the record in an orderly appendix. Their three-volume, 1,142 page document was not, however, arranged in chronological order and did not even include an index until respondent requested that the court direct them to prepare and file one.

[5] Petitioners' suggestion that all federal fee-shifting statutes are to be interpreted *pari passu* misconstrues this Court's observation in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983), that all those statutes which provide for an award of attorney's fees when "appropriate" are to be construed similarly.

CONCLUSION

Since the petition raises no question worthy of review, the writ should not issue.

Respectfully submitted,

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